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Public Prosecutor v Yap Chai Yee

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–11–01 OF 2014
AZIAH ALI, AHMADI ASNAWI AND ZAMANI A RAHIM JJCA
3 NOVEMBER 2015

C *Criminal Procedure — Appeal — Appeal against acquittal and discharge — Appeal by prosecution against decision of High Court — Accused person charged with four charges of dangerous drugs — Drugs found in apartment unit — Same drugs found in accused's pocket also found in apartment — Whether accused person had knowledge of drugs — Accused person had keys to unit* D *— Whether accused person had exclusive access to unit — Dangerous Drugs Act 1952*

The accused was charged in the High Court with four charges of dangerous drugs. Inspector Saravanan ('SP4') led a police party to make an observation at E a car park. SP4 noticed a male Chinese ('the accused') walked suspiciously, turning left and right as if searching for someone. SP4 approached the accused, introduced himself as a police officer and directed the accused to take out all the items from his pocket. The accused took out two packages of a magazine paper from his left trousers pocket and handed over to SP4. SP4 opened and F examined the said two packages in the presence of the accused and found each package to contain one plastic packet of suspected drugs. On further examination of the accused's trousers pocket, SP4 found a bunch of keys, and two access cards. Using the access cards and the room keys SP4 managed to get into the lift and entered an apartment. In the living room, the accused retrieved G two black plastic bags and handed them over to SP4. A translucent plastic packet written with the word 'Diamond' containing suspected drugs was found inside. The accused's defence was that the said apartment was rented by the accused at the behest of his friend, Jimmy. He did not know the landlord as the said apartment was rented through a property agent, KS Lim. Jimmy paid the H rentals of the said apartment. Jimmy allowed the accused to stay and to take care of the said apartment. Jimmy had liberal access to the said apartment at anytime he wished. Sometimes he went there with his friends, one of them known as Foong. Each of them had a set of keys to the said apartment. When KS Lim handed the keys of the said apartment to the accused, the latter had I purchased a new padlock which was fixed at the front grill door. The accused caused two other set of keys to the said apartment to be duplicated. He gave each set to Jimmy and Foong. Apart from the said apartment's keys, KS Lim, the property agent also gave the accused two access cards, one for the lift and the other for the car park. On the night he was arrested, the accused was

walking towards his car when several persons approached him. They introduced themselves as policemen and stopped him. The accused was surprised and cooperated with the police. The accused's body was searched and nothing incriminating was found on him. The police seized the keys, a wallet and two access cards from his left trousers pocket. From his wallet, the police seized the accused's identity card, driving licence, some cash and an ATM card belonging to Foong. After his detention at the car park, the police escorted the accused to the said apartment. In the said apartment the police found some packets in the living room. The accused denied that he showed the packets or handed over the packets to the police. He did not know the contents of the packets. The packets belonged to Jimmy. The police searched the whole of the said apartment. The accused denied the charges levelled against him. He said the drugs belonged to Jimmy. The accused informed the investigating officer of the existence of Jimmy and Foong. The trial judge found that the accused had failed to rebut the presumed knowledge of the drugs under s 37(d) of the Dangerous Drugs Act 1952 ('the Act') and failed to cast any reasonable doubt on the prosecution's case. The accused was found guilty, and was convicted on the first charge and sentenced to ten years imprisonment. Finally, the trial judge found that the accused had succeeded in rebutting the presumed knowledge under s 37(d) of the Act which was raised against him. The accused too had cast a reasonable doubt on the prosecution case. As a result, the accused was acquitted and discharged from the second to the fourth charges. In the present appeal, the prosecution argued that the accused's conduct of bringing SP4 and his team to the said apartment and taking two black plastic bags containing the drugs and handed over to SP4 was indicative of the accused's possession and having knowledge of the drugs; and the drugs seized from the accused's left trousers pocket at the car park was methamphetamine, which was identical to the drugs methamphetamine seized in the said apartment. The evidence of the recovery of the drugs methamphetamine from the accused's trousers pocket was relevant to show that the accused had knowledge of the drugs methamphetamine found in the said apartment, which formed the subject matter of the second charge.

Held, dismissing the appeal; affirming the decision of the High Court and acquitting and discharging the accused:

(1) The conduct of the accused in taking SP4 into the said apartment and taking two black plastic bags and handing over to SP4 was relevant and admissible under s 8 of the Evidence Act 1950. The evidence of conduct must not be viewed in isolation but must be considered with other evidence or circumstances of the case (see para 49).

(2) Another relevant evidence was whether the accused had exclusive possession of the said apartment. In determining this issue the trial judge had rightly considered the tenancy agreement ('P13'). The prosecution produced P13 to establish that the accused was the sole occupant of the

said apartment. This had been rejected by the trial judge as the proprietor of the said apartment had failed to affix its common seal onto P13 as required by law rendering P13 to be inadmissible. As the proprietor was a limited company, the prosecution failed to produce the company's resolution and the actual person who executed P13 on behalf of the said company (see para 50).

(3) The prosecution failed to refer P13 to the accused during cross examination at the defence stage in order to establish the nexus between P13 and the accused. Therefore, based on the findings by the trial judge, it was inaccurate to come to a finding that the accused was the sole occupant of the said apartment merely by relying on P13. Consequently the impugned drugs found in the said apartment cannot be said to be in the accused's custody, control and possession (see para 51).

(4) The defence had been greatly prejudiced and had been at a disadvantage as a result of the prosecution's failure to make available the property agent, KS Lim to support the defence case. Neither a satisfactory explanation was forthcoming to justify his absence from attending court. There were numerous serious infirmities in the present case, as alluded above, more importantly on the issues of whether the accused was the sole occupant of the said apartment to the exclusion of others including Jimmy and Foong, the non-production of the property agent, KS Lim to be called as a defence witness and the shoddy investigation which deprived the accused of a fair trial (see paras 56 & 70).

[Bahasa Malaysia summary

Tertuduh dipertuduh di Mahkamah Tinggi dengan empat pertuduhan berkaitan dadah berbahaya. Inspektor Saravanan ('SP4') mengetuai pasukan polis dalam menjalankan pemerhatian ke atas sebuah tempat letak kereta. SP4 menyedari seorang lelaki berbangsa Cina ('tertuduh') berjalan dengan meragukan, memusing kiri dan kanan seolah-olah mencari seseorang. SP4 mendekati tertuduh, memperkenalkan dirinya sebagai pegawai polis dan mengarahkan tertuduh mengeluarkan semua barang dari sakunya. Tertuduh mengeluarkan dua bungkusan kertas majalah dari saku kiri seluarnya dan menyerahkannya kepada SP4. SP4 membuka dan memeriksa kedua-dua bungkusan tersebut dengan kehadiran tertuduh dan mendapati setiap bungkusan mengandungi satu bungkusan plastik bahan yang disyaki dadah. SP4 menjumpai segugus kunci dan dua kad akses selepas pemeriksaan lanjut ke atas saku seluar. Menggunakan kad akses dan kunci bilik, SP4 berjaya masuk ke dalam lif dan memasuki sebuah apartment. Di dalam ruang tamu, tertuduh menjumpai dua beg plastik hitam dan menyerahkannya kepada SP. Sebuah beg plastik jernih yang tertera perkataan 'Diamond' disyaki mengandungi dadah dijumpai di dalam. Pembelaan tertuduh adalah bahawa apartmen tersebut disewakan oleh tertuduh atas perintah kawannya, Jimmy. Dia tidak mengenali tuan rumah kerana apartment tersebut disewakan melalui seorang agen

hartanah, KS Lim. Jimmy yang membayar sewa apartmen tersebut. Jimmy membenarkan tertuduh untuk tinggal dan menjaga apartmen itu. Jimmy mempunyai akses bebas terhadap apartmen tersebut bila-bila dia mahu. Kadang kala, dia akan pergi ke sana dengan kawan-kawannya, salah seorang daripada mereka dikenali sebagai Foong. Setiap seorang mempunyai segugus kunci untuk apartmen. Apabila KS Lim menyerahkan kunci apartmen kepada tertuduh, tertuduh membeli kunci mangga pada gril pintu depan. Tertuduh membuat pemdua untuk kunci apartmen. Dia memberi setiap set kepada Jimmy dan Foong. Selain kunci apartmen, KS Lim, agen hartanah juga memberikan dua kad akses kepada tertuduh, satu untuk lif dan satu lagi untuk tempat letak kereta. Pada malam dia ditahan, tertuduh dilihat berjalan ke arah keretanya apabila beberapa orang mendekatinya. Mereka memperkenalkan diri sebagai polis dan memberhentikannya. Tertuduh terperanjat dan berkerjasama dengan polis. Badan tertuduh diperiksa dan tiada barang salah yang ditemui padanya. Pihak polis merampas kunci, dompet dan dua kad akses dari saku kiri seluarnya. Dari dompetnya, polis merampas kad pengenalan tertuduh, lesen memandu, beberapa tunai dan kad ATM milik Foong. Selepas penahanannya di tempat letak kereta, polis mengiringnya tertuduh ke apartmen tersebut. Di apartmen, polis menemui beberapa bungkusan di ruang tamu. Tertuduh menafikan menunjukkan bungkusan itu atau menyerahkannya kepada polis. Dia tidak tahu kandungan bungkusan itu. Bungkusan milik Jimmy. Polis menyelongkar seluruh apartmen. Tertuduh menafikan pertuduhan yang dipertuduh atasnya. Katanya, dadah milik Jimmy. Tertuduh memaklumkan pegawai penyiasat tentang kewujudan Jimmy dan Foong. Hakim bicara memutuskan bahawa tertuduh gagal menyangkal anggapan pengetahuan tentang dadah di bawah s 37(d) Akta Dadah Berbahaya 1952 ('Akta') dan gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Tertuduh didapati bersalah dan disabitkan kesalahan atas pertuduhan pertama dan dijatuhkan hukuman sepuluh tahun penjara. Akhir sekali, hakim bicara mendapati bahawa tertuduh berjaya menyangkal anggapan pengetahuan di bawah s 37(d) Akta yang dibangkitkan terhadapnya. Tertuduh juga telah menimbulkan keraguan munasabah terhadap kes pendakwaan. Oleh itu, tertuduh dilepaskan dan dibebaskan daripada dua daripada empat pertuduhan. Dalam rayuan ini, pihak pendakwaan menghujahkan bahawa tindakan tertuduh membawa SP4 dan pasukannya ke atas apartmen dan mengambil dua beg plastik hitam mengandungi dadah dan menyerahkannya kepada SP4 menunjukkan milikan dan pengetahuan tentang dadah; dan dadah yang dirampas daripada tertuduh saku kiri seluar di tempat letak kereta ialah methamphetamine, yang sama dengan dadah methamphetamine yang dirampas di apartmen tersebut. Bukti rampasan dadah methamphetamine dari saku seluar tertuduh relevan untuk menunjukkan bahawa tertuduh mempunyai pengetahuan tentang dadah methamphetamine yang dijumpai di dalam apartmen tersebut, yang menjadi hal perkara pertuduhan kedua.

A B C D E F G H I

Diputuskan, menolak rayuan; mengesahkan keputusan Mahkamah Tinggi dan melepaskan dan membebaskan tertuduh:

(1) Tindakan tertuduh mengambil SP4 ke dalam apartmen dan mengambil dua beg plastik hitam dan menyerahkannya kepada SP4 adalah relevan dan boleh diterima di bawah s 8 Akta Keterangan 1950. Bukti kelakuan tidak harus dilihat secara berasingan tetapi mesti dipertimbangkan dengan keterangan atau hal keadaan kes itu (lihat perenggan 49).

(2) Satu lagi keterangan relevan ialah sama ada tertuduh mempunyai milikan eksklusif apartmen tersebut. Dalam menentukan isu ini hakim bicara telah, dengan betul mempertimbangkan perjanjian penyewaan ('P13'). Pihak pendakwaan mengemukakan P13 untuk membuktikan bahawa tertuduh penghuni tunggal apartmen tersebut. Ini ditolak oleh hakim bicara kerana tuan punya apartmen gagal melampirkan meterai rasmi pada P13 seperti yang dikehendaki oleh undang-undang, menjadikan P13 tidak boleh diterima. Kerana milikan adalah sebuah syarikat terhad, pihak pendakwaan gagal mengemukakan resolusi syarikat dan orang sebenar yang melaksanakan P13 bagi pihak syarikat tersebut (lihat perenggan 50).

(3) Pihak pendakwaan gagal merujuk P13 kepada tertuduh semasa pemeriksaan balas di peringkat pembelaan dalam usaha untuk mewujudkan pertalian antara P13 dan tertuduh. Oleh itu, berdasarkan penemuan oleh hakim bicara, tidak tepat untuk memutuskan bahawa tertuduh ialah penghuni tunggal apartmen tersebut dengan semata-mata bergantung kepada P13. Oleh itu, dadah yang dipertikaikan dijumpai di dalam apartmen tersebut tidak boleh dikatakan berada dalam jagaan, kawalan dan milikan tertuduh (lihat perenggan 51).

(4) Pihak pembelaan amat terprejudis dan kerugian akibat kegagalan pihak pendakwaan untuk mengemukakan ejen hartanah, KS Lim untuk menyokong kes pembelaan. Penjelasan yang memuaskan juga tidak timbul untuk mewajarkan ketidakhadirannya ke mahkamah. Terdapat beberapa kelemahan yang serius dalam kes ini, seperti yang dinyatakan di atas, yang lebih penting dalam isu sama ada tertuduh adalah penghuni tunggal apartmen tersebut, tidak termasuk lain termasuk Jimmy dan Foong, kegagalan mengemukakan ejen hartanah, KS Lim sebagai saksi pembelaan dan siasatan yang kurang bermutu yang menafikan tertuduh daripada perbicaraan adil (lihat perenggan 56 & 70).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 223–228.

Cases referred to

Al Bakhtiar bin Ab Samat v PP [2012] 4 MLJ 713; [2013] 7 CLJ 458, CA (refd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367, FC (refd)
Chan King Yu v PP [2009] 1 MLJ 457, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Ibrahim Mohamad & Anor v PP [2011] 6 MLJ 387; [2011] 4 CLJ 113, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Masoumeh Gholami Khaveh v PP [2013] 5 MLJ 688; [2013] 5 CLJ 59, CA (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Asnawi bin Yusuf [2011] 4 MLJ 16; [2012] 3 CLJ 41, CA (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 3 CLJ 457, FC (refd)
PP v Mohamad Roslan bin Desa - Mahkamah Persekutuan Rayuan Jenayah No 05–28–2007(K), FC (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)
Wjchai Onprom v PP [2006] 5 MLJ 415; [2006] 3 CLJ 724, CA (refd)
Wong Yew Ming v PP [1991] 1 MLJ 31, SC (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 12(3), 37(d), 39B(2), First Schedule
Evidence Act 1950 ss 8, 14, 15

Appeal from: Criminal Trial No 45A-353 & 355 of 2011, High Court, Shah Alam.

Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Geethan Ram Vincent (Jayarubbiny Jayaraj with him) (Sivananthan & Co) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] Yap Chai Yee, the appellant/accused was charged in the Shah Alam High Court with four charges of dangerous drugs related offences as follows:

First Charge (P2)

Bahawa kamu pada 29 Mac 2011 jam lebih kurang 10.30 malam, di tempat Parking Kereta Bawah Bangunan Rhythm Avenue Persiaran Kewajipan USJ 19, Subang Jaya, di dalam Daerah Subang Jaya, di dalam Negeri Selangor Darul Ehsan, telah didapati dalam kawalan kamu dadah berbahaya sejumlah berat 46.0 gram methamphetamine, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

Second Charge (P4)

Bahawa kamu pada 29 Mac 2011 jam lebih kurang 10.30 malam, di alamat C18-01, Rhythm Avenue Persiaran Kewajipan USJ 19, Subang Jaya, di dalam Daerah Subang Jaya, di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya sejumlah berat 407.9 gram methamphetamine, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1) (a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Third Charge (P6)

Bahawa kamu pada 29 Mac 2011 jam lebih kurang 10.30 malam, di alamat C18-01, Rhythm Avenue Persiaran Kewajipan USJ 19, Subang Jaya, di dalam Daerah Subang Jaya, di dalam Negeri Selangor Darul Ehsan, telah didapati dalam kawalan kamu dadah berbahaya sejumlah berat 0.7 gram methamphetamine, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

Fourth Charge (P8)

Bahawa kamu pada 29 Mac 2011 jam lebih kurang 10.30 malam, di alamat C18-01, Rhythm Avenue Persiaran Kewajipan USJ 19, Subang Jaya, di dalam Daerah Subang Jaya, di dalam Negeri Selangor Darul Ehsan, telah didapati dalam kawalan kamu dadah berbahaya sejumlah berat 26.0 gram Ketamine, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

THE PROSECUTION'S CASE

[2] On 29 March 2011, at about 10.20pm, Insp Saravanan a/l Diwantong ('SP4') led a police party consisting of eight personnel to make an observation at a car park of the Bangunan Rhythm Avenue, Persiaran Kewajipan USJ 19, Subang Jaya. At that place, SP4 noticed a male Chinese (later identified as 'the accused') walking suspiciously by turning left and right, as though the accused was searching for someone. SP4 approached the accused and introduced himself as a police officer. SP4 directed the accused to take out all the items from his pocket. In response, the accused took out two packages of a magazine paper from his left trousers pocket and handed over to SP4.

[3] SP4 opened and examined the said two packages in the presence of the accused and found each package to contain one plastic packet of suspected drugs, exhs P20A and P20B. On further examination of the accused's trousers pocket, SP4 found a bunch of keys, exh P14A-G and two access cards, exhs P15A and P15B. The accused was detained.

[4] Using the access cards, exhs P15A and P15B and the room keys, exh P12E-G, SP4 managed to get into the lift and entered apartment No C18–01 at level 18. In the living room, the accused retrieved two black plastic bags, exhs P24 and P28 and handed over to SP4. In exh P24, SP4 found a translucent plastic packet written with the word 'Diamond' containing suspected drugs, exh P25A and also eight translucent plastic packets containing suspected drugs, exh P26A-H.

[5] In exh P28, SP4 found two transparent plastic packets containing suspected drugs, exhs P30A and P30B and a transparent plastic packet containing 290 ecstasy pills, exh P32. A scale, exh P38 and a sealer, exh P39 were also recovered in the living room. All the exhibits were seized.

[6] The accused and the exhibits were taken to IPK, Selangor. The next day on 30 March 2011, at about 8.30am, SP4 handed over the exhibits to the investigating officer, Insp Rozlia Razali ('SP5') through 'Borang Serahan', exh P45.

[7] On 5 April 2011, at about 12.30pm, the suspected drugs in three boxes marked R01, R02 and R03 were sent to the Government Chemist, Dr Vanitha a/p Kunalan ('SP3') for analysis.

[8] Upon analysis, SP3 found as follows:

(a) the box marked 'RO1' contained two packages of magazine paper, containing a plastic packet each of crystal clear substance which contained *46g of methamphetamine* (the subject matter of the First Charge, P2).

(b)

(i) the box marked 'RO2' contained, inter alia, eight plastic packets marked RA2-RA9 containing crystal clear substance which contained *332.4g of methamphetamine*.

(ii) two plastic packets marked SB1-SB2 respectively containing crystal clear substance which contained *75.5g of methamphetamine*, thereby making a total of 407.9g (332.4g + 75.5g) of methamphetamine (the subject matter of the second charge, P4).

(iii) a packet plastic marked 'SB3' containing 290 green coloured pills, made of *0.7g of methamphetamine* (the subject matter of the third charge, P6) and 26.0g of ketamine (the subject matter of the fourth charge, P8).

(c) the box marked RO3 contained a stainless steel container and two plastic containers, each marked RE, RG and RF respectively. All the three exhibits were found to contain traces of methamphetamine.

[9] Methamphetamine and ketamine are dangerous drugs as listed in the First Schedule of the Dangerous Drugs Act 1952.

FINDINGS OF THE TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[10] At the close of the prosecution's case, the trial judge found that the chain of evidence pertaining to the identity of the drugs was unbroken until its analysis by SP3, see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489.

[11] At the time of his arrest, the accused was in custody, control and possession of the impugned drugs which formed the subject matter of the charges P2 (46.0g of methamphetamine), P4 (407.9g of methamphetamine), P6 (0.7g of methamphetamine) and P8 (26.0g of ketamine), see *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 and *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356. By virtue of s 37(d) of the Act, the accused was presumed to have knowledge of the impugned drugs.

[12] As the drugs methamphetamine was found in large quantity (407.9g the subject matter of the trafficking charge, P4) in the apartment where the accused was the occupier, an inference may be drawn that he kept the drugs for the purpose of trafficking and not for personal consumption. 'Keeping' is one of the acts of trafficking as listed in s 2 of the Act, see *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764, *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65, *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415; [2006] 3 CLJ 724 and *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 3 CLJ 457.

[13] As regard the nature of the drugs and its amount which formed the subject matter of the charges in P2, P4, P6 and P8, there was no serious challenge mounted by the accused. The trial judge was satisfied with the analysis of the drugs and the evidence of SP3.

[14] The trial judge found, at the end of the prosecution's case, that the prosecution had made out a prima facie case against the accused as charged under the charges P2, P4, P6 and P8. The accused was called to enter his defence.

[15] At the close of the prosecution's case, eight witnesses (witnesses No 3–10 and No 13 in the witness list) were offered to the defence only required KS Lim, the property agent to be their witness.

THE DEFENCE CASE

[16] The acused gave evidence on oath. He was 56 years old. He was a graduate in Bachelor of Arts (Business Studies & Computer Science) from York University, Toronto, Canada.

[17] In late 1990, the accused started a computer firm dealing in hardware and software programming. The business continued until 2008. After that he operated the business from his house.

[18] In October, 2010, the accused moved to stay at the apartment No C-18–01, Block C, Rhythm Avenue, Subang Jaya until his arrest on 29 March 2011 (the said 'apartment').

[19] The accused had a friend known as Foong whom he had known since 2004. Foong introduced the accused to Jimmy who owned a few apartments at Amcorp Mall in Petaling Jaya and Regency Condominium in Klang.

[20] Jimmy also had several computers. In the event his computers were not functioning or broke down, the accused would attend to them. His relationship with Jimmy was on a basis of employee and employer relationship.

[21] The said apartment was rented by the accused at the behest of Jimmy. He did not know the landlord as the said apartment was rented through a property agent, KS Lim. Foong was involved in the negotiation of the rental of the said apartment. Jimmy paid the rentals of the said apartment.

[22] Jimmy allowed the accused to stay and to take care of the said apartment. Jimmy had liberal access to the said apartment at anytime he wished. Sometimes he went there with his friends.

[23] Jimmy and Foong were good friends. Each of them had a set of keys to the said apartment. When the property agent, KS Lim handed the keys of the said apartment to the accused, the latter had purchased a new padlock which

was fixed at the front grill door. The accused caused two other set of keys to the said apartment to be duplicated. He gave each set to Jimmy and Foong.

[24] Apart from the said apartment's keys, KS Lim, the property agent also gave the accused two access cards, one for the lift and the other for the car park.

[25] On the night of 29 March 2011, the accused was walking towards his car when several persons approached him. They introduced themselves as policemen and stopped him. The accused was surprised and cooperated with the police.

[26] The accused's body was searched and nothing incriminating was found on him. The police seized the keys, a wallet and two access cards from his left trousers pocket. From his wallet, the police seized the accused's identity card, driving licence, some cash and an ATM card belonging to Foong.

[27] After his detention at the car park, the police escorted the accused to the said apartment. In the said apartment the police found some packets in the living room. The accused denied that he showed the packets or handed over the packets to the police. He did not know the contents of the packets. The packets belonged to Jimmy. The police searched the whole of the said apartment.

[28] Thereafter, the police brought the accused to Amcorp Mall, to a flat in Bandar Sunway and Regency Condominium to look for Jimmy but to no avail. Then they returned to the said apartment.

[29] The accused denied the charges levelled against him. He said the drugs belonged to Jimmy. The accused informed the investigating officer of the existence of Jimmy and Foong.

[30] At the end of the defence case, the prosecution was unable to make available the property agent, KS Lim who was offered and accepted by the accused. The trial judge ordered the witness, KS Lim to be present on 12 April 2013, see at p 97 of the appeal record.

[31] At the continued hearing on 8 July 2013, the defence insisted to call KS Lim but he was not available as he could not be traced. The defence had no alternative but to close its case, see p 109 of the appeal record.

FINDINGS OF THE TRIAL JUDGE

[32] As regard the first charge, P2 where the subject matter of the drugs was 46g of methamphetamine which was seized from the accused at the car park, the trial judge was satisfied that:

(a) the evidence of SP4 relating to the recovery of the drugs in the accused's left trousers pocket was clear; and

(b) there was no break in the chain of evidence pertaining to the identity of the drugs.

[33] However, the trial judge did not agree with the accused that the drugs were not found in his left trousers pocket. In other words, the trial judge disbelieved the evidence of the accused.

[34] The trial judge found that the accused had failed to rebut the presumed knowledge of the drugs under s 37(d) of the Act and has failed to cast any reasonable doubt on the prosecution's case. The accused was found guilty, and was convicted on the first charge, P2 and sentenced to ten years imprisonment from the date of his arrest. However, no whipping was imposed on the accused as he had exceeded the age of 50 years.

[35] The subject matter of the second charge, P4, the third charge, P6 and the fourth charge, P8, were recovered from the said apartment. The impugned drugs was not concealed from sight. The question arose – whether access to the said apartment was exclusive to the accused. The trial judge considered the tenancy agreement, P13 and found as follows:

(a) P13 was not properly executed by Red Channel in accordance with the law;

(b) P13 was executed by unknown persons, or if there were any signatories, they were not called by the prosecution; and

(c) the prosecution had failed to elicit evidence from the accused that he had signed P13.

[36] The trial judge found that the rental of the said apartment vide P13 was negotiated between Foong and the property agent, KS Lim. The said apartment was purchased by Puan Low Geok Hong, PW2, at the end of 2009 at a purchase price of RM165,000. The landlord was a company called Red Channel Sdn Bhd which was her husband's company. It was her husband, Chan Chin Yeow who signed P13 in his capacity as the landlord. The advanced rentals of eight months was paid direct to the account of Red Channel Sdn Bhd at the Public Bank. During the period of tenancy, SP2 had not been to the said

apartment. As such SP2 did not know who exactly occupied the said apartment.

[37] According to SP2, there were two sets of keys to the said apartment. One set of keys was given to the tenant and another set was with her. A bunch of keys, consisting of four keys were as follows:

(a) the key No 'H22' for the grill	P14A
(b) the key 'ST Guchi' for the padlock to the grill	P14B
(c) the key 'Watch Guard' for the main door	P14C
(d) the key 'Excel' for the letter box	P14D

[38] Apart from the keys, two access cards, P15A and P15B, were given to the accused. The card was accessible to the lift at level 18 where the said apartment was located.

[39] SP2 never met the accused in the negotiation of the rental of the said apartment. One Lim Joon Hua, an agent, negotiated the rental on her behalf.

[40] Further the trial judge found that Jimmy and Foong were real persons and not fictitious characters. Jimmy was the accused's employer who enlisted the accused if any of his computers broke down. After the accused's arrest, the police brought him to Amcorp Mall to locate Jimmy but failed. Jimmy often came to the said apartment with his friends. The investigation by the investigating officer, SP5 was unsatisfactory as she did not investigate the whereabout of Jimmy and Foong.

[41] The property agent, KS Lim, was also a real character because SP2 said that the negotiation for the rental of the said apartment was carried out by him. The property agent, KS Lim, was listed as one of the prosecution witnesses and he was offered to the defence. Having accepted the offer, the prosecution failed to make him available and failed to explain his unavailability to be present in court. Failure to produce the property agent, KS Lim, had deprived the accused to advance a reliable and complete defence which was opened to him to be acquitted.

[42] Finally the trial judge found that the accused had succeeded in rebutting the presumed knowledge under s 37(d) of the Act which was raised against him. The accused too had cast a reasonable doubt on the prosecution case. As a result, the accused was acquitted and discharged from the second charge, P4, the third charge, P6 and the fourth charge, P8 respectively.

THE APPEAL

[43] The prosecution canvassed two issues before us. Firstly, the accused's conduct of bringing SP4 and his team to the said apartment and took two black plastic bags containing the drugs and handed over to SP4 was indicative of the accused's possession and having knowledge of the drugs. The accused's conduct is admissible under s 8 of the Evidence Act 1950, see *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367 at p 122.

[44] Secondly, the drugs seized from the accused's left trousers pocket at the car park was methamphetamine. And the drugs methamphetamine seized in the said apartment was identical in terms of the shape of the drugs ie crystal clear and the shape of the packets with the drugs methamphetamine recovered from the accused's left trousers pocket. The evidence of the recovery of the drugs methamphetamine from the accused's trousers pocket was relevant to show that the accused had knowledge of the drugs methamphetamine found in the said apartment, which formed the subject matter of the second charge, P4, weighing 407.9g. This evidence is said to be relevant and admissible as similar fact evidence under ss 14 and 15 of the Evidence Act 1950, see *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31 at pp 31–33. The learned deputy also argued that the earlier seizure of the drugs methamphetamine from the accused's left trousers pocket at the car park was also relevant to show the accused's presumed knowledge of the drugs in respect of the third charge, P6 and the fourth charges, P8. It is noteworthy that the subject matter of the fourth charge, P8 is ketamine, an entirely different kind of drug and not methamphetamine.

[45] Learned deputy also argued that despite Jimmy and Foong had accessed to the said apartment, it did not necessarily mean that the accused was not in possession of the drugs recovered in the living room. Learned deputy asserted that the accused was in possession of the drugs seized from the said apartment based on the facts summarised below:

(a) at the time of the raid, there was no one else in the said apartment;

(b) the drugs seized from the said apartment was at the instance of the accused and he handed the drugs to SP4;

(c) the accused had power to deal with the drugs as owner to the exclusion of others;

(d) the accused was in custody and control of the drugs seized in two black bags, exhs P24 and P25 in the said apartment. The presumption of possession and knowledge under s 37(d) of the Act was applicable;

(e) the access cards to the car park and the lift to Level 18 were found in the possession of the accused;

(f) the grill door and the main door of the said apartment was opened using the keys recovered from the accused;

(g) the accused handed the two bags containing the drugs to SP4; and

(h) the principle in *Wong Yew Ming*, is applicable in favour of the prosecution.

[46] Learned deputy urged this court to set aside the accused's acquittal on the second charge, P4, the third charge, P6 and the fourth charge, P8 in Criminal Appeal No B-05–11–01 of 2014 and substituted the same with a conviction under s 39B(2) in respect of the second charge, P4 and the convictions under s 12(3) in respect of the third charge, P6 and the fourth charge, P8 of the Act respectively and to pass the sentences accordingly.

[47] It would appear that the prosecution was satisfied with the sentence imposed on the accused on the first charge, P2 and filed no appeal in respect thereof. However, the accused lodged an appeal against his conviction and sentence in respect of the first charge, P2 vide Criminal Appeal No B-05–12–01 of 2014.

OUR FINDINGS

[48] We were not required to consider the accused's appeal against his conviction and sentence on the first charge, P2 as the defence had withdrawn its appeal at the outset of the hearing of this appeal. The accused's appeal was thus struck out accordingly.

[49] The conduct of the accused in taking SP4 into the said apartment and taking two black plastic bags and handed over to SP4 is relevant and admissible under s 8 of the Evidence Act 1950. The evidence of conduct must not be viewed in isolation but must be considered with other evidence or circumstances of the case, see *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] 6 MLJ 387; [2011] 4 CLJ 113.

[50] Another relevant evidence is whether the accused had exclusive possession of the said apartment. In determining this issue the trial judge had rightly considered the tenancy agreement, P13. The prosecution produced P13 to establish that the accused was the sole occupant of the said apartment. This had been rejected by the trial judge as the proprietor of the said apartment, Red Channel Sdn Bhd had failed to affix its common seal onto P13 as required by law rendering P13 to be inadmissible. As the proprietor was a limited company, the prosecution had failed to produce the company's resolution and the actual person who executed P13 on behalf of the said company.

[51] Besides, the prosecution had failed to refer P13 to the accused during cross examination at the defence stage in order to establish the nexus between P13 and the accused. Therefore, based on the above findings by the trial judge, it is inaccurate to come to a finding that the accused was the sole occupant of the said apartment merely by relying on P13. Consequently the impugned drugs found in the said apartment cannot be said to be in the accused's custody, control and possession.

[52] The evidence of SP2 supported the accused's contention that the accused did not have exclusive possession of the said apartment and all the things found therein. In her evidence, SP2 said that she had never met the accused during the negotiation to rent the said apartment. And she did not know who was exactly the sitting tenant.

[53] Further, the investigation by SP5 to determine whether the accused was the sole tenant of the said apartment was unsatisfactory and shoddy. The evidence of SP5 showed that there were no serious efforts by him to prove that it was only the accused who had exclusive occupancy of the said apartment. SP5 only seized a shirt from the said apartment to match-fit it to the accused. SP5's method of investigation was unsatisfactory as inference may be drawn that there might have been other clothes belonging to either Jimmy or Foong (to be considered below) in the said apartment. The trial judge had dealt at great length on the shoddy investigation by SP5, see pp 93–94 of the appeal record Vol 2. In the case of *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, Federal Court held:

> (61) Before parting with the case, it is necessary to state that from the facts and circumstances of this appeal it would appear to us that the investigation had been somewhat shoddy. Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the life and personal liberty of a citizen is a precious one guaranteed by art 5 of the Federal Constitution and its deprivation shall be only in accordance with law. (62) Thus, before accusing an innocent person of the commission of a grave crime like the one punishable under s 302 of the PC, *an honest, sincere and dispassionate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Therefore, greater care and circumspection are needed by the investigating agency in this regard*.

[54] The next logical question: whether Jimmy, Foong and the property agent, KS Lim are real characters or fictional. We have no hesitation to conclude that Jimmy, Foong and the property agent, KS Lim were not fictitious characters orchestrated by the accused. The property agent, KS Lim was listed as a witness at No 13 on the prosecution's list, P10 and he was offered to the defence at the close of the prosecution's case which the defence elected to accept the offer, see p 97 of the appeal record Vol 2. It is evident that the property

agent, KS Lim was involved in the negotiation of the tenancy with the tenant. Having offered the property agent, KS Lim, to the defence and the defence had accepted the same, the prosecution failed to make him available to be called as a defence witness. In the case of *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41, where the issue on the failure by the prosecution to secure the attendance of a witness to be called by the defence, the Court of Appeal propagated as follows:

> (1) When witness were offered by the prosecution to the defence at the end of the case for the prosecution, it was the bounden duty of the prosecution to avail those witnesses for the defence. If in the exercise of that duty, the prosecution failed to fulfill that obligation, the accused must be acquitted. In the present case, the three witnesses were offered to the defence by the prosecution. The defence too had alerted the prosecution of their wish to call them and that made it all the more imperative for the prosecution to avail them. The reason proffered by the prosecution that they could not be traced as they were Indonesians was simply untenable and indefensible particularly in this case which involved the liberty of an individual.

[55] The case of *Asnawi Yusuf*, has been referred to in the later Court of Appeal case of *Masoumeh Gholami Khaveh v Public Prosecutor* [2013] 5 MLJ 688; [2013] 5 CLJ 59 where the court enunciated as follows:

> (18) In our judgment in the context of the present case, this is a serious misdirection. Even though Amin was not an important witness in the unfolding of the narrative of the prosecution's case, that did not relieve the learned trial judge from determining whether Amin was in point of fact an important and material witness as far as the defence was concerned. The learned trial judge misdirected herself in that she overlooked and failed to appreciate the importance of Amin to the defence's case as he was the one who could raise a reasonable doubt on the prosecution's case. This was never considered by the learned trial judge. In the light of this unsatisfactory feature, in our judgment, the appellant had been seriously prejudiced. In *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41, this court held that it is the bounden duty of the prosecution to secure the attendance of witnesses once they were offered as witnesses to the defence. Likewise, in the present case the prosecution has the bounden duty to secure the attendance of Amin. The appellant may waive the attendance of Amin. It is true that if Amin was produced in court, he might not able to give favorable evidence for the appellant, but that did not detract from the prosecution's duty to produce him in court. The appellant cannot be deprived of Amin's attendance in order to prove her innocence.

[56] The defence had been greatly prejudiced and has been at a disadvantage as a result of the prosecution's failure to make available the property agent, KS Lim to support the defence case. Neither a satisfactory explanation was forthcoming to justify his absence from attending court. We endorse the trial judge's finding on this issue. On the non production of the property agent, KS

Lim, the trial judge has considered at great length at pp 29 and 30 of the appeal record Vol 1.

[57] Now, we turn to Jimmy and Foong who were material witnesses, but not called by the prosecution to testify. The trial judge was, therefore, correct in law and in fact that both Jimmy and Foong were not manufactured or fictitious characters to bolster the defence case. Neither were the characters of Jimmy and Foong an afterthought or a recent invention created by the accused. The findings of the trial judge at p 32 of the appeal record Vol 1 were as follows:

(a) Jimmy dan Foong bukanlah watak-watak dongeng ataupun suatu rekaan atau yang berbentuk 'aftertought' oleh OKT;

(b) Jimmy adalah majikan OKT dan sekiranya dia ada masalah 'computer breakdown' OKT dipanggil-khidmat oleh Jimmy (ms 42 Nota Keterangan);

(c) Jimmy selalu ke flat dan pernah datang dengan kawan-kawannya seperti dikatakan oleh OKT (di ms 43 Nota Keterangan):

They would stay for a while, maybe half a day. Jimmy could come to the flat at anytime, dan

(d) Jimmy menjadi asas kepercayaan pihak polis yang telah serbu flat dan diakui bahawa Jimmy telah dicari polis bersama OKT bila pergi ke Amcorp Mall (Keterangan SP4 di ms 27 dan 29 Nota Keterangan).

[58] The shoddy investigation by SP5 had also incurred the wrath of the trial judge. The failure of SP5 to investigate promptly and thoroughly had clearly prejudiced the accused as held by the trial judge. His Lordship had made extensive reference to the evidence given by SP5 at pp 34–37 of the notes of proceedings. In the case of *Chan King Yu v Public Prosecutor* [2009] 1 MLJ 457, the Federal Court said as follows:

> (84) As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement exh D29 which was made on the day after his arrest, I am of the view that the police had all the time to check as to their veracity. The burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts. The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement (see the case of *Alcontara a/l Ambross Anthony v Public Prosecutor*).

[59] To sum up, SP5 had failed to investigate on the following material matters:

(a) the materiality or role played by the property agent, KS Lim in this case; and

(b) the materiality of Jimmy and Foong and most important of all whether they had free access to the said apartment.

[60] The net result of the shoddy investigation was succinctly put by the Federal Court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 as follows:

> The investigating officer's failure to investigate this allegation despite being informed of this fact during investigation was a serious omission. An inference in the accused's favour ought to have been drawn by the trial judge at the close of the prosecution case when the investigating officer's failure was brought to light. If so, doubt would have been cast upon the evidence of the investigating officer.

[61] Now we propose to consider the issue of similar facts evidence which formed the backbone of learned deputy's contention on the accused's knowledge of the impugned drugs. Learned deputy anchored his submission on the authority of the Supreme Court in *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31. A question of law of public interest was referred to the Supreme Court as follows:

> whether in a trial in which the accused is charged for trafficking in respect of a particular quantity of dangerous drugs, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the accused.

The answer to the question posed was in the affirmative.

[62] In *Wong Yew Ming*'s case, notwithstanding the amount of the heroin had exceeded the statutory amount which therefore activated the presumption of trafficking under the Act. To bring home the charge against the applicant by calling additional evidence from two-self confessed drugs addict, namely, PW8 and PW9. PW8's evidence is the relevant evidence in this application because it related to the charge against the applicant. The relevant part of PW8's evidence which is the subject matter of the question posed reads as follows:

> I paid $45 for a straw tube from first accused. I did not see where he got the drugs. I was in the house and I saw him go out of the house to get the drugs. He went out through the main door; but was within the compound of the house. He came back not more than five minutes later. He handed over, the drugs to me.

[63] His evidence continued in the following words:

> Each time I bought a straw tube for $45. First accused handed me the drugs on every occasion. I handed him the money. I did not buy any drugs from second accused.

Over these 20 times, I did not see where first accused got the drugs from.' A

[64] Having considered PW8's evidence, Hashim Yeop Sani CJM (as he then was) concluded as follows:

In the context of the Act PW8's evidence is in our view clearly admissible. The prosecution wanted to show that on previous occasions the applicant had sold drugs and therefore had been trafficking in drugs. In our law when the statutory amount of drugs is proved to be in the possession of any person the presumption is invoked and the person shall be presumed until the contrary is proved, 'to be trafficking' in the said drug. Under the Act possession of the statutory amount of drug is trafficking. PW8's evidence was relevant to show knowledge and that the prosecution of the drug by the applicant was not accidental. B C

[65] The factual matrix in *Wong Yew Ming*'s case, may be distinguished with the facts in the recent Court of Appeal case of *Al Bakhtiar bin Ab Samat v Public Prosecutor* [2012] 4 MLJ 713 ; [2013] 7 CLJ 458. The facts are these. One Chief Insp Hafiz ('SP7') together with SP1 and SP5 had stopped the appellant who was on a motorcycle. Having searched his body, SP5 found a pouch from his right jeans pocket. Inside the pouch five plastic packets of cannabis were seized. This formed the subject matter of the charge under s 6 of the Dangerous Drugs Act 1952 for possession of 30.40g of cannabis against the appellant. Upon interrogation, the appellant led SP7 and his men to a certain house. They entered a room in the said house and the appellant pointed to a cupboard. The appellant retrieved a package containing the cannabis and handed it over to SP7. This was the subject matter of the trafficking charge of 993.8g of cannabis. D E F

[66] In his defence, the appellant disputed the version given by the prosecution. He alleged that he never had handed the cannabis to the police. On the contrary, the appellant contended that the police themselves recovered the drugs from the cupboard and underneath the table. The appellant contended that he had no knowledge of the said drugs. The appellant's cousin and his deceased uncle ('Kamil') who was a drug addict, had access to the said room. A rehabilitation officer, SD2 confirmed that Kamil was a drug addict. The appellant's siblings, SD3, SD4 and a relative, SD5, gave evidence that Kamil stayed in the said house. Further, the appellant's cousin who had since disappeared after the appellant's arrest, had free access to the room where the drugs was found. G H

[67] At the end of the defence case, the trial judge held that the defence was one of bare denial and an afterthought. It was also held that the fact that the appellant was arrested in respect of the 30.40g cannabis found on him earlier attracted the application of s 15 of the Evidence Act whereby it imputed the appellant's knowledge of the drugs. The appellant was found guilty, he was I

convicted and sentenced to death for the offence of trafficking in 993.8g of cannabis. Hence this appeal by the appellant. One of the two issues raised by the appellant before the Court of Appeal was that the trial judge misdirected himself when His Lordship acted on the evidence of the first charge for possession of 30.40g of cannabis as similar fact evidence to prove knowledge in respect of the trafficking charge.

[68] On the issue of similar fact evidence – whether there is similarity between the offence of possession of 30.40g of cannabis for which the appellant was arrested earlier and charged and the present charge of trafficking in 993.8g of the same drug and whether similarity of the offences is a prerequisite, the case of *Public Prosecutor v Mohamad Roslan bin Desa* – Mahkamah Persekutuan Rayuan Jenayah No 05–28–2007(K) was referred. The Federal Court, in a judgment delivered by Arifin Zakaria CJM (as he then was) stated the following as the proper test for admission of similar fact evidence.

> The courts below rejected the similar fact evidence on the basis that there was no striking similarity between what happened in the earlier case and the present case. It should perhaps be noted that the House of Lords in *DPP v P* had retracted from the test laid down in Boardman as to the requirement of 'striking similarity' and said that it was inappropriate to single out 'striking similarity' as an essential element in every case. But following Boardman it was held that the essential feature of admissibility of such evidence is whether its probative force in support of the charge is sufficiently great to make it just to admit the evidence notwithstanding that its prejudicial effect on the accused tending to show that he was guilty of another offence. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree. The test has since been authoritatively laid down in *DPP v P* in terms of probative value as against its prejudicial effect. There is force in saying that the decision in *DPP v P* is in line with ss 14 and 15 of the Evidence Act as 'striking similarity' has never been a requirement of the said sections.

[69] Having referred to a plethora of authorities, both from local and English jurisdiction, the court in *Al Bakhtiar bin Ab Samat*'s case, concluded that the similarity test is not a prerequisite for the admission of similar fact evidence. As the case was riddled with a number of unsatisfactory features, the conviction recorded against the appellant was unsafe. The appeal was allowed and the conviction and sentence of the trafficking charge was set aside. The appellant was acquitted and discharged.

[70] In the instant case, learned deputy's argument on similarity test for the admission of the drugs possession charge of 46.0g of methamphetamine which was recovered earlier from the accused's left trousers pocket at the car park is not admissible to prove knowledge of the methamphetamine in the trafficking charge of 407.9g of methamphetamine seized in the said apartment.

[71] As can be seen, there are numerous serious infirmities in the present case, as alluded above, more importantly on the issues of whether the accused was the sole occupant of the said apartment to the exclusion of others including Jimmy and Foong, the non production of the property agent, KS Lim to be called as a defence witness and the shoddy investigation which deprived the accused of a fair trial.

CONCLUSION

[72] Having regard to the above consideration, we are unanimous that the trial judge's decision to acquit and discharged the accused on the second charge, P4, the third charge, P6 and the fourth charge, P8 was justified. We, therefore, affirmed the decision of the High Court. The accused stand acquitted and discharged.

Appeal dismissed; decision of the High Court affirmed and accused acquitted and discharged.

Reported by Afiq Mohamad Noor